80450-8

Court of Appeals No. 58825-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

EMILY LANE HOMEOWNERS ASSOCIATION,
a Washington nonprofit corporation,

Respondent,

v.

COLONIAL DEVELOPMENT, LLC,
a Washington limited liability company,

Petitioner,

THE ALMARK CORPORATION, a Washington corporation; CRITCHLOW HOMES, INC., a Washington corporation; MARK B. SCHMITZ, an individual; RICHARD E. WAGNER and ESTHER WAGNER, d/b/a WOODHAVEN HOMES, individuals; ALFRED J. MUS, an individual; and JEFFREY CRITCHLOW, an individual,

Petitioners.

PETITION FOR REVIEW BY THE SUPREME COURT

Eileen I. McKillop, WSBA 21602
Attorneys for Petitioners

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

State Cases

Cases

State Statutes

A. IDENTITY OF PETITIONERS

Petitioners Colonial Development, LLC, The Almark Corporation, Critchlow Homes, Inc., Mark B. Schmitz, Richard Wagner and Esther Wagner, d/b/a Woodhaven Homes, Alfred Muss and Jeffrey Critchlow ask this Court to accept review of the Court of Appeals' decisions terminating review designated in Part B of this petition.

B. COURT OF APPEALS' DECISIONS

Petitioners seeks review of the Court of Appeals' published decisions in *Emily Lane Homeowners Association v. Colonial Development, LLC*, No. 58825-7-I, filed on June 18, 2007, and the case linked to this one, *Chadwick Farms Owners Ass'n v. FHC, LLC*, No. 58796-0-1, also filed on June 18, 2007.[1]

C. ISSUES PRESENTED FOR REVIEW

The fundamental issues in this case are whether Washington's Limited Liability Company Act has any provision for the preservation of any claims against an LLC after its certificate of formation has been cancelled, and whether the June 7, 2006 amendment to the Act, RCW 25.15.303, is retroactive as a remedial and curative statute. Another

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[1] A copy of the Court of Appeals' published decisions are in the Appendix at Exhibit A and B.

issue is whether the amendment applies to a dissolved LLC, instead of a cancelled LLC, and only allows claims *against* an LLC, but does not allow an LLC to *prosecute* any claims.

D. STATEMENT OF THE CASE

Thousands of limited liability companies voluntarily dissolve every year by winding up the LLC's affairs, paying known claims, and distributing its assets in compliance with Washington's Limited Liability Company Act. Under RCW 25.15.295(2), an LLC can sue or be sued following dissolution and during its winding up period. However, RCW 25.15.295(2) makes it clear that once a certificate of formation is cancelled, whether by filing a certificate of cancellation or otherwise, the LLC cannot sue or be sued.

This is a case where an LLC complied with the Act, completed its winding up of the LLC's affairs, paid all known claims, and filed a certificate of cancellation. However, almost seven months later, Emily Lane filed a Complaint against the LLC, its members, and two individuals for alleged construction defects relating to the construction of the Emily Lane condominiums. Emily Lane is a small 24-unit condominium in Kenmore, Washington. Petitioner Colonial Development, LLC, was the developer and sold the condominium, which

was completed in July 2001.[2] Colonial Development was formed as an LLC on January 22, 1998 for the sole purpose of developing and selling the Emily Lane condominiums. Colonial Development is the only Declarant listed on the Emily Lane Condominium Declaration.[3] The first unit was sold on July 20, 2001 and the last unit was sold on January 3, 2003.[4]

Colonial Development and its five members made no profit on this project and actually lost hundreds of thousands of dollars. In addition to the construction loan, the five members of Colonial Development contributed a total of $652,943.47 of their personal capital to build this project.[5] Due to cost overruns and the change from vinyl siding to cedar siding, the members lost $418,116.93 of their personal capital on this project.[6] Almost four years after the project was complete and after the one year warranty on the last unit sold had expired, on December 22, 2004, the members voted to dissolve the LLC effective December 31, 2004, and distribute the remaining funds in the capital

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[2] CP 185.
[3] CP 197-297.
[4] CP 153; CP 298-309; CP 318-455.
[5] CP 299-304; CP 310; CP 299, CP 315-317.
[6] CP 299-304; CP 310-311; CP 315-317.

account of only $9,126.54.[7] At the time the last distribution was made, it is undisputed that Colonial Development and its members had no knowledge of any claims by Emily Lane.[8] On December 31, 2004, Colonial Development filed a Certificate of Cancellation of Limited Liability Company with the Washington State Secretary of State.[9] Five months later, and without any prior notice of a claim, Emily Lane sent Colonial Development a letter notifying it of alleged construction defects relating to the Project.[10] Although Colonial and its members had no prior notice of any claims, Emily Lane asserted that Colonial and its members "should have known" of the alleged defects because of prior warranty requests by the Owners. However, *the record shows that none of the previous warranty claims involve any of the alleged defects asserted in this action*.[11]

After refusing to allow the members to inspect the property, Emily Lane filed suit against Colonial; its five members Contempra Homes, Inc., Critchlow Homes, Inc., The Almark Corp., Richard E.

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[7] CP 579.
[8] CP 313-314.
[9] CP 577.
[10] CP 1344-1355 and CP 583.
[11] CP 305-306 and CP 752-754; CP 721-729; CP 730-735; CP 736-737; and CP 746-750.

Wagner and Esther Wagner d/b/a Woodhaven Homes, and Fred Mus; and individuals Mark Schmitz and Jeffrey Critchlow attempting to impose personal liability on them for Colonial's debts.[12] The Complaint alleges a litany of causes of action against all of the Defendants.[13]

On June 7, 2006, Colonial, its members, and the two individually named defendants filed a motion for summary judgment of Emily Lane's claims.[14] The central issue with respect to Colonial was whether Washington's Limited Liability Company Act bars Emily Lane's claims which were filed almost seven months after its certificate of formation was cancelled. Emily Lane argued that under the Act, claims against a cancelled LLC never abate at all. Emily Lane also argued that RCW 25.15.303, which was effective on June 7, 2006, applies retroactively to revive its barred claims. The trial court denied Colonial's motion for summary judgment and motion for reconsideration. The case was then certified for discretionary review by the trial court because it involves a controlling question of law as to whether RCW 25.15.303 is retroactive and applies to a cancelled LLC.[15]

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[12] CP 198-188 and CP 190-191.
[13] CP 603-621.
[14] CP 146-176; CP 181-631; CP 177-180.
[15] CP 1164-1168.

With respect to the members and the individually named Defendants, the trial court ruled that Emily Lane had no basis in fact or law to support any of its claims against the members and the individually named Defendants and granted summary judgment.[16] Emily Lane sought cross-review of the summary judgment dismissal of the members and individually named defendants' motions for summary judgment.

On June 18, 2007, Division One of the Court of Appeals answered the controlling issue in a published decision linked to this one, *Chadwick Farms Owners Ass'n v. FHC, LLC*, No. 58796-0-1. The Court of Appeals held that RCW 25.15.303 is retroactive as a remedial and curative statute and that RCW 25.15.303 applies to both dissolved and cancelled LLCs. The Court of Appeals also held that RCW 25.15.303 only allows claims *against* a dissolved or cancelled LLC but does not allow a dissolved or cancelled LLC to *pursue* any claims. Lastly, the Court of Appeals ruled that to the extent the trial court dismissed Emily Lane's claims against the members and individually named defendants on the basis that they were immune from liability under the Act, the dismissal was error.

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[16] CP 1178-1180.

E. ARGUMENT

1. Summary of Argument

This case involves an issue of substantial public interest that should be determined by the Supreme Court because the Court of Appeals' decisions contravenes the plain language of the new survival statute, RCW 25.15.303, and allows suits against a cancelled LLC who has completed its winding up and has ceased to exist as a legal entity, making RCW 25.15.295(2) inoperative.

In June 2006, the legislature chose to create a survival statute based on the *dissolution* of an LLC, instead of its *cancellation*, without amending RCW 25.15.295(2) or RCW 25.15.070(2)(c). The language of RCW 25.15.303, when read together with RCW 25.15.070 and RCW 25.15.295(2), make it clear that the survival statute is based on the *dissolution* of an LLC, and not the *cancellation* of an LLC. The plain language of the statute obviates the need for legislative history in this instance.

The Court of Appeals misconstrues RCW 25.15.303 to only authorize claims *against* a cancelled LLC but does not allow a cancelled LLC to *pursue* any claims. Since a dissolved or cancelled LLC has no right to prosecute any claims, including claims for bad faith, its insurer

and additional insured carriers can now deny the defense of the action and refuse to indemnify those injured by the precancellation activities of its insured with impunity. Moreover, the Court of Appeals' decision allows a cancelled LLC's subcontractors (and their liability insurers who collect premiums specifically to insure these risks) to avoid all responsibility to defend and indemnify the LLC for damages they caused, thereby eliminating another "deep pocket" of recovery to pay for these damages.

The Court of Appeals also incorrectly decided that RCW 25.15.303 applies retroactively as a remedial and curative statute. RCW 25.15.303 is not curative because it does not clarify any ambiguity in the Limited Liability Company Act. Rather, it creates new rights and remedies against a dissolved LLC. Nor is the statute remedial. This court has described "remedial" statutes as those that "afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." Here, RCW 25.15.303 does not create a supplemental remedy for enforcement of a preexisting right. RCW 25.15.303 constitutes a substantive change in the law, and creates a survival statute to provide claimants new rights and remedies against a dissolved LLC. When a statute brings about a change in substantive

rights, it is presumed to apply prospectively only.

2. Whether RCW 25.15.303 Applies to a Cancelled LLC Versus a Dissolved LLC is an Issue of Substantial Public Interest That This Court Should Resolve.

This case involves an issue of substantial public interest because the Court of Appeals' decision contravenes the plain language of Washington's Limited Liability Company Act and RCW 25.15.303, and allows claims against a cancelled LLC after it has completed its winding up, distributed all of its assets, and ceased to exist as a legal entity. Washington's Limited Liability Company Act was enacted on October 1, 1994.[17] Unlike Washington's Business Corporate Act, the legal status of limited liability companies in Washington is governed by the Act, and not the common law. The Limited Liability Company Act has no provision for the preservation of any claims or causes of action following the cancellation of the LLC's certificate of formation.

Filing a certificate of cancellation is the LLC's certification that it has completed winding up activities, including meeting its obligations pursuant to RCW 25.15.300. Under RCW 25.15.295(2), the filing of a certificate of cancellation terminates the LLC's ability to sue or be sued.

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[17] RCW 25.15.900.

RCW 25.15.295(2) preexisted and survived the 2006 amendments to the Act. The statute provides as follows:

> Upon dissolution of a limited liability company and ***until the filing of a certificate of cancellation as provided in RCW 25.15.080***, the persons winding up the limited liability company's affairs ***may***, in the name of, and for and on behalf of, the limited liability company, ***prosecute and defend suits***, whether civil, criminal, or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company.[18]

RCW 25.15.295(2) makes it clear that there is a period of time between the dissolution of an LLC and the cancellation of its certificate of formation, that an LLC can sue and be sued. The clear implication is that the persons winding up the LLC's affairs may not "prosecute and defend suits" after the certificate of formation is canceled. RCW 25.15.295(2) is unambiguous and its plain language must be given effect. Where statutory language is plain, free from ambiguity, and devoid of uncertainty, there is no room for construction because the legislature's intention derives solely from the language of the statute.[19] Thus, RCW 25.15.295(2) authorizes only actions against dissolved LLCs, but does

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[18] RCW 25.15.295 (emphasis added).
[19] RCW 25.15.070.

not allow for claims against LLCs that have completed the process of winding up and have filed a certificate of cancellation.

RCW 25.15.070 makes it clear that an LLC ceases to exist as a legal entity ***when its certificate of formation is canceled***:

> A limited liability company formed under this chapter ***shall be a separate legal entity***, the existence of which as a separate entity shall continue ***until cancellation of the limited liability company's certificate of formation***.[20]

During that post-dissolution process, an LLC continues to exist, and its activities are limited to the winding up activities set forth in RCW 25.15.295(2), which include prosecuting and defending claims.[21] Thus, under the Act, there is a difference between the "dissolution" of an LLC and the "cancellation of its certificate of formation."

RCW 25.15.303 provides that the *dissolution* of a LLC does not take away or impair any remedy against the LLC for any right or claim existing, whether prior to or after *dissolution*, unless an action is commenced within three years after the effective date of dissolution. Here, the Legislature chose to create a survival statute based on the *dissolution* of the LLC, and not the cancellation of the LLC. Had the

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[20] *Berrocal v. Fernandez*, 155 Wn.2d 585, 590 (2005), *accord Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.2d 914, 919 (2006).
[21] RCW 25.15.295.

legislature wanted RCW 25.15.303 to preserve claims against a canceled LLC, it would have used the word "canceled", as opposed to "dissolved". The legislature used the term "dissolution" in the specialized sense described above and not to describe the final step in the cancellation of the LLC's certificate of formation. The court should assume the legislature means exactly what it says.[22] By holding that RCW 25.15.303 applies to canceled LLCs, the Court of Appeals ignored the plain language of RCW 25.15.303, then erroneously added words to the statute that our legislature chose not to include because it thought the omission of "canceled" was "inartful". A court may not rewrite a statute merely because it could have been drafted more clearly.[23] RCW 25.15.303 on its face authorizes only actions against a *dissolved* LLC but does not allow for claims against an LLC after the filing of its certificate of cancellation.

3. The Legislature Chose to Enact RCW 25.15.303 Without Amending RCW 25.15.295(2) or RCW 25.15.070.

To determine legislative intent, courts look first to the language of the statute *and related statutes* to determine whether plain statutory

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[22] *State v. Freeman*, 124 Wn.App. 413, 415, 101 P.3d 878 (2004).
[23] *See, e.g., In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69 (2005).

language shows the intended meaning of the statute in question. [24] If this examination leads to a plain meaning, that is the end of the inquiry.[25] A fundamental canon of construction holds a statute should not be interpreted so as to render one part inoperative or in a way that renders statutory language meaningless or superfluous.[26] The two related statutes which are relevant and may help show the plain meaning of the provision at issue are RCW 25.15.070 and RCW 25.15.295(2). RCW 25.15.070(2)(c) provides that an LLC exists "as a separate legal entity" until its certificate of formation is cancelled, then it dies. Under RCW 25.15.295(2), an LLC can sue or be sued during its normal life or following dissolution during its winding up period. However, once its certificate of formation is cancelled, the LLC cannot sue or be sued.

The Legislature enacted RCW 25.15.303 without amending RCW 25.15.070(2)(c) or RCW 25.15.295(2). The legislature intended that RCW 25.15.303, RCW 25.15.295(2) and RCW 25.15.070 would coexist, and that the latter statutes would do so without modification. All provisions in a statute must, so far as possible, be construed so as not

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[24] *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).
[25] *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).
[26] *Ballard Square*, 146 P.3d 914, 918 (2006); *see Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship*, 156 Wn.2d 696, 698-99, 131 P.3d 905 (2006).

to contradict each other.[27] The language of RCW 25.15.303 when read together with other statutes in Chapter 25.15 plainly do not allow suits against an LLC after its certificate of formation has been canceled. Rather, RCW 25.15.303 allows suits against a dissolved LLC for three years following the effective date of dissolution. However, once the LLC's certificate of formation is canceled, the LLC ceases to exist under the Act and can no longer sue or be sued.

4. The Court of Appeals' Interpretation of RCW 25.15.303 to Only Allow Claims Against a Cancelled LLC is Nonsensical and Overly Harsh.

While the Court of Appeals decided it could just rewrite the statute to include "canceled", the Court of Appeals erroneously interprets RCW 25.15.303 to only allow claims *against* a canceled LLC, and not to actions *by* a canceled LLC. Courts must avoid readings of statutes that result in unlikely, absurd, or strained consequences.[28] The text of RCW 25.15.303 is similar to RCW 23B.14.340 in that it refers only to claims "against" a corporation, and not to claims "by" a corporation.

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[27] *See In re Sherwood's Estate*, 122 Wash. 648, 655-56 (1922).
[28] *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 924, 146 P.3d 423 (2006).

In the case of an administrative dissolution under RCW 25.15.285, an LLC may apply for reinstatement within two years of the effective date of dissolution.[29] During this period, the LLC has the right to prosecute and defend an action after dissolution. If the LLC fails to reinstate, the Secretary of State shall cancel the limited liability company's certificate of formation.[30] At this point, the LLC ceases to exist under RCW 25.15.070(2)(c) and it cannot sue or be sued.

Unlike a dissolved LLC, a cancelled LLC has no means to reinstate its certificate of formation. There is nothing in RCW 25.15.303 that anticipates that an LLC must respond to legal action after its certificate of formation has been cancelled. RCW 25.15.303 directly addresses the survival of claims against a "*dissolved*" LLC. The three year period dates from the effective date of the "*dissolution*", and not the cancellation of the LLC's certificate of formation. To interpret the statute as applying only to claims *against* a cancelled LLC leads to absurd and unnecessarily harsh consequences. A cancelled LLC has no ability to reinstate, and thus, has no ability to pursue claims against its liability insurer and additional insured carriers for bad faith denial of

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[29] RCW 25.15.290(1) and (4).
[30] RCW 25.15.290(4).

third-party claims, or its subcontractors for the damages they caused. Statutes should not be construed so as to yield such absurd results.

5. RCW 25.15.303 is not Retroactive Because it is Neither Curative nor Remedial and Creates a New Substantive Right Against a Cancelled LLC.

The Court of Appeals ruled that RCW 25.15.303 is retroactive because it is remedial and curative and does not impair a vested right. The Court of Appeals merely concluded that since the legislature adopted RCW 25.15.303 and RCW 23B.14.340 (the corporate survival statute) at the same time, then RCW 25.15.303 must be remedial. The Court of Appeals did not even address the issue of whether RCW 25.15.303 affects a substantive right.

In *1000 Virginia,* this court discussed the basic rules respecting prospectively and retroactivity of new enactments in general. Statutes are presumed to run prospectively.[31] However, a statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial, provided that retroactive application does not run afoul of any constitutional prohibition.[32] Unlike RCW 23B.14.340, which on its face show clear

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[31] *Wash. Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990).
[32] *1000 Virginia Ltd. v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

legislative intent that the statute apply retroactively, RCW 25.15.303 contains no explicit direction concerning its retrospective or prospective application. The House and Senate reports on the bill are similarly silent.[33]

The Court of Appeals improperly concluded that RCW 25.15.303 is curative. An enactment is curative only if it clarifies or technically corrects an ambiguous statute.[34] The Court of Appeals' in *Ballard Square* did not construe the Limited Liability Company Act. While the adoption of RCW 25.15.303 and the amendments to RCW 23B.14.340 both came on the heels of the Court of Appeals' decision in *Ballard Square*, RCW 25.15.303 does not clarify any statute. It merely creates a new survival period for claims against dissolved LLCs that never existed before.

The Court of Appeals also came to the erroneous conclusion that the statute is remedial because "there is no basis to distinguish the remedial and curative nature of this provision from the similar provision in the BCA." This court in *Ballard Square* ruled that RCW 23B.14.340 on its face shows clear legislative intent that the statute apply

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[33] See Exhibit C of the Appendix, Senate House Report, SB 6531 (2006); Senate Bill Report, SB 6531 (2006).
[34] *McGee Guest Homes*, 142 Wn.2d at 325, 12 P.3d 144 (2000).

retroactively and did not find that it was remedial or curative.[35] The legislature intentionally omitted this same language in RCW 25.15.303. A statute is remedial when it relates to practice, procedure or remedies, and does not affect a substantive or vested right.[36] This court has described "remedial" statutes as those that "afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries."[37] Procedural laws prescribe a method of enforcing a previously existing substantive right and relate to the form of the proceeding or the operation of laws. Substantive laws establish new rules, rights, and duties, or change existing ones.[38]

Here, RCW 25.15.303 does not supplement an existing right or remedy. RCW 25.15.303 is a survival statute and operates on the right or claim itself.[39] The amendment prospectively grants a new substantive right to bring claims against a dissolved LLC. Washington Courts consistently refuse to apply a statute retroactively if it brings about a change in substantive rights and imposes "new liability" on defendants.[40]

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[35] *Ballard Square*, 146 P.3d 914, 922 (2006).
[36] *1000 Virginia*, 158 Wn.2d 566, 586, 146 P.3d 423 (2006).
[37] *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976).
[38] BLACK'S LAW DICTIONARY 1429 (6th ed. 1990).
[39] *Van Pelt v. Greathouse,* 364 N.W.2d 14, 20 (Neb.1985).
[40] *See, Bayless v. Community College Dist No. XIX,* 84 Wn. App. 309, 312, 927 P.2d 254 (1996); *In re F.D. Processing*, 119 Wn.2d. 452, 460, 832 P.2d 1303 (1992).

Under these principles, RCW 25.15.303 does not apply retroactively as a remedial or curative statute.

6. Emily Lane Failed to Prove its Claims Against the Members and Individual Defendants.

The trial court granted summary judgment dismissing Emily Lane's claims against the five members of the LLC and the two individually named defendants ruling that there was no basis in fact or law to support the claims. The Court of Appeals did not reach the merits of the claims and merely concluded without explanation that if the dismissal was on the basis that the LLC structure provided immunity, it was error. Mark Schmitz and Jeffrey Critchlow are not members of the LLC. Thus, these individuals cannot be personally liable to Emily Lane under any legal theory. Under RCW 25.15.125(1), members of a LLC are not personally liable for the debts, obligations, and liabilities of an LLC, whether arising in tort or contract. A member of a LLC is only personally liable for his or her own torts.[41] Here, Emily Lane's claims against the five members are based solely on their status as a member of the LLC. None of the claims involve individual torts by any of these members. Under RCW 25.15.300(2), members are not personally liable

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[41] RCW 25.15.125(2).

for unresolved claims if they have complied with the statute. Here, there is no evidence that the members did not comply with the Act and properly wind up the LLC. The Court of Appeals' mere conclusion that the members may be liable for violation of the Act can not be a substitute for essential facts.

F. CONCLUSION

RCW 25.15.303 plainly applies only to claims against a *dissolved* LLC and not to claims against a canceled LLC. The Court of Appeals improperly legislates into the statute the word "canceled". It also misconstrues the statute to allow only claims against a canceled LLC and not actions by a canceled LLC. Moreover, the Court's decision improperly applies the statute retroactively as a remedial and curative statute. For all of these reasons, this case presents "an issue of substantial public interest that should be determined by the Supreme Court," and the Petitioners respectfully request that the Court grant this Petition and reverse the Court of Appeals' June 18, 2007 decisions.

DATED this 17 day of July, 2007.

OLES MORRISON RINKER & BAKER LLP

By _____
Eileen I. McKillop, WSBA 21602
Attorneys for Petitioners

APPENDIX

A. Court of Appeals' published decision in Chadwick Farms Owners Ass'n v. FHC, LLC, No. 58796-0-I, filed on June 18, 2007.

B. Court of Appeals' published decision in Emily Lane Homeowners Ass'n v. Colonial Development, LLC, No. 58825-7-I, filed on June 18, 2007.

C. Senate House Report, SB 6531 (2006); Senate Bill Report, SB 6531 (2006).

APPENDIX A

Opinion in PDF Format

Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 58796-0
Title of Case: Chadwick Farms, Appellant V. Fhc, Respondent
File Date: 06/18/2007

SOURCE OF APPEAL

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Docket No: 04-2-20885-8
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JUDGES

Authored by C. Kenneth Grosse
Concurring: William Baker
Anne Ellington

COUNSEL OF RECORD

Counsel for Appellant(s)
Mary H. Spillane
William Kastner & Gibbs
Two Union Square
601 Union St Ste 4100
Seattle, WA, 98101-2380

John Phillip Evans
Williams Kastner & Gibbs PLLC
601 Union St Ste 4100
Seattle, WA, 98101-2380

Counsel for Respondent(s)
Jonathan Dirk Holt
Scheer & Zehnder LLP

701 Pike St Ste 2200
Seattle, WA, 98101-2358

Martin T. Crowder
Karr Tuttle Campbell
1201 3rd Ave Ste 2900
Seattle, WA, 98101-3028

Michaelanne Ehrenberg
Karr Tuttle Campbell
1201 3rd Ave Ste 2900
Seattle, WA, 98101-3028

John Patrick Hayes
Forsberg & Umlauf
901 5th Ave Ste 1700
Seattle, WA, 98164-2050

Viivi Vanderslice
Forsberg & Umlauf
901 5th Ave Ste 1700
Seattle, WA, 98164-2050

Richard Scott Fallon
Attorney at Law
1111 3rd Ave Ste 2400
Seattle, WA, 98101-3238

William Scott Clement
Clement & Drotz
2801 Alaskan Way Ste 300
Pier 70
Seattle, WA, 98121-1128

John E. Drotz
Clement & Drotz
2801 Alaskan Way, Suite 300
Pier 70
Seattle, WA, 98121

David Jesse Bierman
Alexander & Bierman PS
4800 Aurora Ave N
Seattle, WA, 98103-6518

John E. Zehnder Jr.
Scheer & Zehnder LLP
701 Pike St. Ste 2200
Seattle, WA, 98101-2358

Amicus Curiae on behalf of Washington State Bar Association Corporate/business Law Sections
Paul Hamilton Beattie Jr.
Darby & Darby
1191 2nd Ave Fl 20
Seattle, WA, 98101-3438

Robert Dean Welden
Washington State Bar Association
1325 4th Ave Ste 600
Seattle, WA, 98101-2539

Amicus Curiae on behalf of Washington State Trial Lawyers Association Foundation
Bryan Patrick Harnetiaux
Attorney at Law
517 E 17th Ave
Spokane, WA, 99203-2210

View the Opinion in PDF Format

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHADWICK FARMS OWNERS ASSOCIATION, a Washington nonprofit corporation, Appellant, v. FHC, LLC, a Washington limited liability company, Respondent/Cross-Appellant, v. AMERICA 1ST ROOFING & BUILDERS, INC., a Washington corporation; CASCADE UTILITIES, INC., a Washington corporation; MILBRANDT ARCHITECTS, INC., P.S., a Washington corporation; PIERONI ENTERPRISE, INC., d/b/a PIERONI'S LANDSCAPE CONSTRUCTION, a Washington corporation; TIGHT IS	No. 58796-0-I DIVISION ONE PUBLISHED OPINION

RIGHT CONSTRUCTION, a Washington corporation; GUTTERKING, INC., a Washington corporation,

Third Party Defendants/Cross-Respondents.

FILED: June 18, 2007

GROSSE, J -- A 2006 amendment to the statutory framework to limited liability companies providing a three-year survival period within which to commence actions against a dissolved limited liability company (LLC), applies retroactively and permits actions against an LLC even when that company's certificate of formation has been cancelled. The amendment only applies to actions against the company and not to actions brought by a company. Thus, FHC, a dissolved and cancelled LLC, lacks

standing to prosecute a claim for its own benefit.1

FACTS

FHC was formed as a limited liability company on December 23, 1999. Its purpose was to construct the Chadwick Farms condominiums. Once the project was completed, FHC ceased operations. The company did not submit the required annual report and renewal fee to the secretary of state. After providing the required notice to the company, the secretary issued a Certificate of Administrative Dissolution on March 24, 2003.

One August 18, 2004, Chadwick Farms Homeowners Association (Chadwick) brought suit against FHC alleging that it was responsible for a number of construction defects. Seven months later, on March 24, 2005, the secretary cancelled FHC's certificate of formation because two years had passed since the secretary issued the notice of dissolution to FHC.

In May 2005, FHC filed third party claims against several subcontractors. Yet, on August 24, 2005, FHC moved for summary judgment to dismiss Chadwick's claims on the grounds that FHC was no longer a legal entity. Chadwick moved to amend the complaint to include specific members of the LLC. The trial court granted summary

1 This court has before it three cases dealing with limited liability companies and their capacity to sue or be sued under chapter 25.15 RCW. While this case was pending, and after oral argument in Roosevelt v. Grateful Siding, No. 56879-5-I, the Supreme Court issued its decision in Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d 603, 146 P.3d 914 (2006). This court stayed its decision in Roosevelt and linked this case with Colonial Development v. Emily Lane, No. 58825-7-I for purposes of oral argument and decision. The decisions in Roosevelt and Emily Lane will be filed contemporaneously with this decision.

judgment to FHC. For the same reasons, the trial court dismissed FHC's third party claims against the subcontractors. The trial court did not specifically address Chadwick's motion to amend the complaint.

ANALYSIS

The Washington Limited Liability Companies Act (LLCA)2 governs the formation, operation, and dissolution of limited liability companies. Unlike the statutes governing business corporations, the LLCA did not provide for survival of a claim after the company's affairs wound up and a certificate of cancellation had been filed. The legislature recently amended the Act to provide for a three-year period after dissolution within which to commence actions against a dissolved limited liability company.3

In its amicus brief, the Washington State Bar Association (WSBA) summarizes the genesis of LLCs ably and succinctly as follows:

> LLCs are recent legal constructs, with a majority of states having only enacted LLC legislation in the 1990s. Washington's Act took effect on October 1, 1994, and Washington case law construing the Act is sparse. "Since limited liability companies have only recently become popular, the law is still evolving." Unhelpfully, courts and scholars routinely comment that LLCs share some qualities of corporations and other qualities of partnerships; they cite by analogy to state corporation acts, to state partnership acts, or to the common law, often without meaningful explanation. From the WSBA's perspective, the only relatively sure footing here is the language of the Act itself. The LLC is a creature of statute, not of common law, and our courts of appeals are expert at construing statutes. That is the only way to unravel this puzzle, even if the solution is not fully satisfying.[4]

Although an LLC can be dissolved in several ways, only administrative

2 Ch. 25.15 RCW; Laws of 1994, ch. 211, § 101.
3 RCW 25.15.303.
4 Washington State Bar Association Amicus Brief at 6-7 (citations omitted) (emphasis in original).

dissolution is relevant here.5 The secretary of state can administratively dissolve a limited liability company if the company fails to pay its license fees or fails to file its required annual reports.6 Once the secretary gives notice that administrative dissolution is pending, the company has 60 days to correct the grounds for dissolution, and, if it fails to do so, the company is dissolved.7 Then, if the company does not apply for reinstatement within two years of the administrative dissolution, the secretary of state "shall" cancel the certificate of formation.8 Once cancelled, an LLC is no longer a separate legal entity.9 That is what occurred here.

2006 Amendment of RCW 25.15.303

Effective May 6, 2006, the legislature amended the Act10 by adding the following section:

> The dissolution of a limited liability company does not take away or

> impair any remedy available against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution. Such an action or proceeding against the limited liability company may be defended by the limited liability company

5 RCW 25.15.270.
6 RCW 25.15.280.
7 RCW 25.15.285(2).
8 RCW 25.15.290(4) provides:

> If an application for reinstatement is not made within the two-year period set forth in subsection (1) of this section, or if the application made within this period is not granted, the secretary of state shall cancel the limited liability company's certificate of formation.

(Emphasis added).
9 RCW 25.15.070(2)(c) provides:

> A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.

10 RCW 25.15.303 (amended by Laws of 2006, ch. 325, § 1) (emphasis added).

> in its own name.

Statutory amendments are generally prospective, but can act retroactively if the legislature so intended or the amendment is remedial or curative.11 This provision was enacted at the same time as a similar amendment to the Business Corporation Act (BCA).12 That amendatory Act provides a maximum three-year survival period for claims against business corporations.13 The legislative histories of both survival statutes indicate that these amendments were passed to address the result of this court's opinion in Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.14 In Ballard Square, this court held that absent a survival statute claims against a corporation arising after the dissolution of the corporation abate.15

In its decision in Ballard Square, the Supreme Court affirmed this court's ruling, but on different grounds.16 The court held that at the time the homeowners commenced their suit, claims brought after dissolution could be brought against a dissolved corporation, subject to the time limitations contained in any applicable statute limitations. However, the legislature amended the BCA in 2006 requiring that actions

11 1000 Virginia Ltd. P'ship v. Vertects, 158 Wn.2d 566, 584, 146 P.3d 423 (2006) (citing McGee Guest Home, Inc. v. Department of Soc. & Health Servs., 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000)).
12 Ch. 23B.14 RCW; S.B. 6596, 59th Leg., Reg. Sess. (Wash. 2006).
13 RCW 23B.14.340 provides a two-year survival period for claims against a corporation dissolved prior to June 7, 2006, and a three-year period for claims against corporations dissolved on or after June 7, 2006.
14 Ballard Square, 126 Wn. App. 285, 195, 196, 108 P.3d 818, review granted, 155 Wn.2d 1024 (2005).
15 See H.B. *Rep.* on S.B. 6531, at 3, 59th Leg., Reg. Sess. (Wash. 2006); H.B. *Rep.* on S.B. 6596, at 7, 59th Leg., Reg. Sess. (Wash. 2006).
16 Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d 603, 146 P.3d 914 (2006).

No. 58796-0-I/6

be brought against the corporation within two years of its dissolution. That amendment was found to be retroactive, precluding the Ballard Square Homeowners Association from bringing an action.

The amendment in Ballard Square is analogous to the statutory amendment to the LLCA. The statutes were sponsored by the same legislators and were enacted in tandem. Indeed, the statutes were signed into law and became effective on the same day.17 Additionally, the legislature enacted both statutes in reaction to the Court of Appeals decision in Ballard Square.18

The provision here is remedial and curative. There is no basis to distinguish the remedial and curative nature of this provision from the similar provision in the BCA. Like the BCA amendment, the purpose of the LLCA amendment was to provide for survival of claims after a company dissolves. The House Bill Report shows that the legislature identified the problem:

> The law governing LLCs has no express provision regarding the preservation of remedies or causes of actions following dissolution of the business entity. There is an implicit recognition of the preservation of at least an already filed claim during the wind up period following dissolution, since the person winding up the affairs is authorized to defend suits against the LLC. However, there is no provision regarding the preservation of claims following cancellation of the certificate of formation.[19]

17 H.B. *Rep.* on S.B. 6531, at 3, 59th Leg., Reg. Sess. (Wash. 2006); H.B. *Rep.* on S.B. 6596, at 7, 59th Leg., Reg. Sess. (Wash. 2006).
18The presumption that a statute applies prospectively is overcome when it is remedial in nature or the legislature provides for retroactive application. A remedial statute is one which relates to practice, procedures and remedies and can be applied retroactively if it does not affect a substantive or vested right. American Discount Corp. v. Shepherd, No. 77974-1, 2007 Wash. LEXIS 292, at *8 (Apr. 19, 2007) (citing State v. McClendon, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997)).
19 H.B. *Rep.* on S.B. 6531, at 2, 59th Leg., Reg. Sess. (Wash. 2006).

No. 58796-0-I/7

The testimony adduced in support of the bill indicated that its raison d'etre was to address the result reached in this court's Ballard Square decision that lef homeowners without a remedy for claims against a dissolved corporation. In the plain language of the statute, the amendment was passed to address the survival of claims following dissolution.20 As seen in the legislative history, the amendment was also crafted to remove any incentive for LLCs to dissolve immediately after a project simply to cut off claims prematurely. And finally, the bill relates to remedies by reviewing the brief description contained in SB 6531 -- "[p]reserving remedies when limited liability companies dissolve."21 As noted in In re Personal Restraint of Matteson:22

> "'When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law.'"

The Supreme Court's analysis is directly applicable. The 2006 amendment is retroactive.

FHC argues that even if the 2006 amendment is retroactive, it is irrelevant as the provision does not deal with claims against a cancelled company. FHC argues that its certificate was cancelled by operation of law and at that point the company ceased to exist as a separate legal entity. Thus, FHC contends, Chadwick's claims against it abated as there is no provision to continue an action against a cancelled limited liability company.

20 S.B. 6531, at 3, 59th Leg., Reg. Sess. (Wash. 2006).
21 S.B. 6531, 59th Leg. Reg. Sess. (Wash. 2006).
22 Matteson, 142 Wn.2d 298, 308, 12 P.3d 585 (2000) (quoting Tomlinson v. Clarke, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992)).

FHC relies upon RCW 25.15.070(2)(c):23

> A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.

And to further support its argument, FHC relies upon the winding up provisions in the Act.24

A company that has been dissolved and is winding up is required to make reasonable provision to pay all known claims and obligations.25 Upon dissolution of an LLC and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up an LLC may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits.26 And, until a certificate of cancellation has been filed, the persons winding up the company's business may "make reasonable provision for the limited liability company's liabilities."27

23 (Emphasis added).
24 See discussion contained in Roosevelt v. Grateful Siding, No. 56879-5-I (June 18, 2007) regarding the statute's winding up process.
25 RCW 25.15.300(2)
26 RCW 25.15.295(2).
27 RCW 25.15.295 provides:

> (1) Unless otherwise provided in a limited liability company agreement, a manager who has not wrongfully dissolved a limited liability company or, if none, the members or a person approved by the members or, if there is more than one class or group of members, then by each class or group of members, in either case, by members contributing, or required to contribute, more than fifty percent of the agreed value (as stated in the records of the limited liability company required to be kept pursuant to RCW 25.15.135) of the contributions made, or required to be made, by all

> members, or by the members in each class or group, as appropriate, may wind up the limited liability company's affairs. The superior courts, upon cause shown, may wind up the limited liability company's affairs upon application of any member or manager, his or her legal representative or

FHC's argument continues. RCW 25.15.300(2) provides that claims accruing after a limited liability company dissolves and begins to wind up its affairs must be provided for if known by the company. But, once the certificate of formation has been cancelled, the company is no longer a legal entity. Generally then, persons winding up a company's affairs would not file a certificate of cancellation until the company's affairs were provided for, since persons winding up a company's affairs are not personally liable to claimants if they make provisions for the company's known liabilities during dissolution. See RCW 25.15.300(2) (members are not personally liable for any unresolved claims if they've complied with the directives contained there). While w can agree with this to some extent, it certainly does not encompass what transpired here or in similar cases now pending in this court. Here, there was no winding up. The cancellation was administrative.

We do, however, believe that the survival provision at issue applies to dissolved LLCs whether or not a certificate of cancellation was issued pursuant to RCW 25.15.080. To hold otherwise would render the 2006 amendment inoperative as it would link the survival of claims not to a specific survival period, but rather to the

> assignee, and in connection therewith, may appoint a receiver.
>
> (2) Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company.

actions or, as in this case, non-action of a company.28 The legislature's purpose in enacting the survival provision was to provide remedies for parties injured by acts of a limited liability company and to provide an incentive for the limited liability company to act in good faith. The plain language of the statute provides that an action may lie for three years after a company is dissolved. Here, it was non-action by the LLC that

resulted in cancellation. Addressing similar arguments in Ballard Square, the Supreme Court found that the survival statute existed "apart from the winding up process."29

And, while we are mindful of the differences between relevant provisions of the BCA and the LLCA, particularly the two-step process of dissolution followed by cancellation in the latter, we cannot think the legislature was anything more than inartful in choosing the term dissolution as the reference for its remedial measure in 2006. To construe the 2006 amendment otherwise would nullify its stated purpose and put the legislature in the position of having enacted a largely useless statute since a dissolved LLC could in the process of winding up, sue and defend before the amendment.

Thus, we hold that Chadwick had three years within which to bring its cause of action.

FHC Claims Against its Subcontractors

FHC filed third party complaints against its subcontractors after it was administratively dissolved and cancelled. The 2006 amendment for survival of claims

28 See Colonial Development v. Emily Lane, No. 58825-7-I (June 18, 2007) (where similar result was reached by this court where the members dissolve and cancel the LLC).
29 Ballard Square, 158 Wn.2d at 609.

only applies to actions which are brought against a company. FHC's failure to reinstate itself is fatal to its pursuit of any claim against the subcontractors. Once the secretary of state cancelled FHC's certificate of formation, FHC lacks standing to prosecute claims against the subcontractors. The Act mandates an administratively dissolved corporation to wind up its affairs by "[t]he expiration of two years after the effective date of dissolution under RCW 25.15.285 without the reinstatement of the limited liability company."30

Chadwick filed its claim against FHC some seven months before the secretary of state cancelled FHC's certificate of formation. FHC could have at any time during those seven months reinstated itself to permit it to properly pursue the winding up process. It failed to do so.

Amended Complaint

The trial court did not rule on Chadwick's motion to amend its complaint to include a company member and manager as defendants for their failure to properly wind up FHC's affairs. Leave to amend a pleading should be "freely given when justice so requires."31 This rule serves to "facilitate proper decisions on the merits, to provide

parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party."32 Chadwick alleges that the duty to properly wind up the company's affairs is required by statute:

30 RCW 25.15.270(6).
31 CR 15(a).
32 Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

> [RCW] 25.15.300 Distribution of assets
>
> (1) Upon the winding up of a limited liability company, the assets shall be distributed as follows:
>
> (a) To creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members under RCW 25.15.215 or 25.15.230;
>
> (b) Unless otherwise provided in a limited liability company agreement, to members and former members in satisfaction of liabilities for distributions under RCW 25.15.215 or 25.15.230; and
>
> (c) Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.
>
> (2) A limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the limited liability company and all claims and obligations which are known to the limited liability company but for which the identity of the claimant is unknown. If there are sufficient assets, such claims and obligations shall be paid in full and any such provision for payment made shall be made in full. If there are insufficient assets, such claims and obligations shall be paid or provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available therefor. Unless otherwise provided in a limited liability company agreement, any remaining assets shall be distributed as provided in this chapter. Any person winding up a limited liability company's affairs who has complied with this section is not personally liable to the claimants of the dissolved limited liability company by reason of such person's actions in winding up the limited liability company.

Chadwick argues that implicit in this proviso is the converse proposition. That is, any person winding up a limited liability company's affairs who has not complied with RCW 25.15.300 is personally liable to the claimants. We agree that this could be the case,

depending on a full examination of the facts.

While cancellation marks the end of a limited liability company as a separate

legal entity, it does not necessarily follow that claims against the LLC or its managers or members also abate.33 Chadwick should have been permitted to amend its complaint. Thus, the trial court's failure to do so was an abuse of its discretion.

The trial court is reversed in part and affirmed in part. We remand for further proceedings in accord with this decision.

WE CONCUR:

33 For example, when a merger involving a limited liability company occurs, RCW 15.15.410(1)(a)(d) provides that any pending action against the merged entity may be "continued as if the merger did not occur . . . ." This is true even though the "separate existence of [a merged LLC] ceases." RCW 25.15.410(1)(a). Such provisions would be meaningless if cancellation abated pending claims.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EMILY LANE HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation, Respondent/Cross-Appellant, v. COLONIAL DEVELOPMENT, L.L.C., a Washington limited liability company, Appellant/Cross-Respondent, THE ALMARK CORPORATION, a Washington corporation; CONTEMPRA HOMES, INC., a Washington corporation; CRITCHLOW HOMES, INC., a Washington corporation; DANIEL J. MUS, an individual; MARK B. SCHMITZ, an individual; RICHARD E. WAGNER and ESTHER WAGNER, individually, and their marital community d/b/a WOODHAVEN HOMES; ALFRED J. MUS, an individual; and JEFFREY CRITCHLOW, an individual; and DOES 1 through 25, Respondents.	No. 58825-7-I DIVISION ONE PUBLISHED OPINION FILED: June 18, 2007

GROSSE, J – A 2006 amendment to the statutory framework of the Washington Limited Liability Companies Act (LLCA)[1] providing a three-year survival period within which to commence actions against a member dissolved limited liability company (LLC), applies retroactively and permits actions against that LLC even if the LLC maintains it completed the winding up process and

[1] Chapter 25.15 RCW.

cancelled its certificate of formation. The trial court's ruling allowing Emily Lane Homeowners Association's claims to go forward was correct.

While the statute provides that no LLC member or manager will be personally liable solely by reason of being a member or manager, the use of the word solely indicates that a member or manager may be personally liable for LLC liabilities where such member's acts cause damages.

FACTS

This case was certified for discretionary review by the trial court because it involved a controlling question of law, whether the 2006 amendment providing for a three-year survival period within which to commence actions against a member dissolved limited liability company (LLC) is retroactive and applicable to a member dissolved LLC that has thereafter cancelled itself. This court has answered that question affirmatively in a case linked to this one, Chadwick Farms Owners Ass'n v. FHC, LLC.[2] There, we held the 2006 amendment to the LLCA to be retroactive.

A commissioner of this court heard argument, and because the court already had cases pending with similar issues, accepted the trial court's certification pursuant to RAP 2.3(b)(4).[3] Emily Lane Homeowners Association

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[2] Chadwick, No. 58796-0-1 (June 18, 2007).

[3] This court has before it three cases dealing with limited liability companies and their capacity to sue or be sued under chapter 25.15 RCW. While Chadwick was pending, and after oral argument was scheduled in Roosevelt v. Grateful Siding, No. 56879-5-I (June 18, 2007), the Supreme Court issued its decision in Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d 603, 146 P.3d 914 (2006). This court stayed its decision in Roosevelt and linked this case with Chadwick for purposes of oral argument and decision. The decisions in Roosevelt and Chadwick will be filed contemporaneously with this decision.

(Emily Lane) sought cross-review of the summary judgment dismissal of their claims against individual members and entities that formed the now-dissolved limited liability company, apparently on the grounds that they were immune from liability. In the interest of judicial economy, the commissioner also accepted review of that issue. This court determines the scope of discretionary review.[4]

Colonial Development, LLC (Colonial) dissolved itself in December 2004 and two weeks later filed a certificate of cancellation. While there are factual disputes about who knew what when, it is undisputed that Emily Lane filed suit on July 19, 2005, seven months after Colonial filed a cancellation certificate, and eight months after Colonial dissolved itself.

Emily Lane cross-appeals the trial court's summary judgment dismissal of its claims against individual members of the LLC.

ANALYSIS

Our holding in Chadwick controls the result. An LLC can be dissolved in several ways.[5] In Chadwick, the LLC was administratively dissolved and cancelled. Here, Colonial dissolved itself and two weeks later cancelled itself. Because the 2006 amendment to the statute is retroactive, Emily Lane has three years from Colonial's dissolution to bring an action. We see no reason to treat a member dissolved and cancelled company differently than an administratively dissolved and cancelled company. Since Emily Lane brought the action within the statutory time allotted, the action is timely.

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[4] RAP 2.3(e). Colonial filed several motions to exclude declarations, arguments and authorities submitted by Emily Lane. Those motions are denied.
[5] RCW 25.15.270.

Summary Judgment Dismissal of Claims

The trial court granted Colonial summary judgment dismissing claims against individual members and managers of the LLC. Although the trial court did not state the basis for its dismissal of Emily Lane's claims against the individual members, Colonial advanced the argument that the members were immune from liability as individuals.[6] Our review is limited solely to this issue. We do not reach the merits of the other claims asserted, nor do we decide whether dismissal was appropriate under all the facts. To the extent the trial court's summary judgment dismissed the claims against individual members of Colonial on the basis that the LLC structure provided immunity from liability, it was error. When Colonial dissolved, each of its members approved, ratified and confirmed all the acts of the manager members.[7]

As noted in Chadwick, other provisions of the Act provide that it is only when the members carry out a proper dissolution in winding up the company, that they are not personally liable. Thus, the converse would necessarily be true. That is, any person winding up an LLC's affairs who has not complied with RCW 25.15.300 may be personally liable to claimants. The members of Colonial may be liable for their failure to properly wind up the company.

The possibility of piercing the veil of an LLC (thus permitting personal liability of its members) was envisioned at the time the statute was enacted.

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[6] We note that Colonial's other arguments, such as insufficient evidence of fraud or abuse to pierce the corporate veil would not be grounds for dismissal as there are genuine disputes of material fact on these points. CR 56.

[7] Members signing the dissolution were Alfred J. Mus, Member and Chairman; Daniel J. Mus, Member and Secretary; Richard Wagner, Member; Mark Schmitz, Member; and Jeffrey Critchlow, Member.

Perceiving such an eventuality, the Washington State Trial Lawyers Association was instrumental in requiring that the LLCA provide a statutory vehicle for piercing the LLC veil. Because case law did not create such a vehicle, a section was added to the legislation that permitted courts to consider factors and policies set forth in established case law with regard to piercing the corporate veil in the context of an LLC.[8]

Emily Lane alleges a litany of questionable activity upon the part of the members of Colonial, including whether or not members of Colonial appointed to the Emily Lane Homeowners Association Board failed to act in a timely manner to address the numerous warranty claims Emily Lane now asserts. In June 2005, Colonial's bookkeeper notified the insurance carrier of a possible claim against the LLC:

> The Notice of Claim to the insurance company may be a moot point. The LLC was dissolved effective 1/21/05 and therefore there is nothing to sue! We did not receive the Notice of Claim prior to the dissolution so we should be clear according to our attorney.
>
> Rejoice!
> Pat

Emily Lane argues that Colonial's aggressive pursuit of litigation after it was cancelled precludes Colonial from cloaking itself in the limited liability cloak afforded to it by the LLCA. Emily Lane provided this court with examples of letters, discovery and affirmative defenses that Colonial pursued even while it was rejoicing over being clear of liability.

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[8] RCW 25.15.060. Stewart M. Landefeld, et al., Washington Corporate Law: Corporations and LLCs, § 4.7 at 4.23 (3rd rel. 2002).

The record before us is complex. To the extent that the trial court denied Emily Lane's claims on the grounds that the individual members were necessarily immune from liability, the dismissal was in error.

Colonial also assigns error to the trial court's refusal to dismiss the claims against it for breach of implied warranty of habitability, breach of fiduciary duty, violation of chapter 19.40 RCW, breach of the Condominium Act's warranties of quality, misrepresentations in Public Offering Statement, Consumer Protection Act violations, fraudulent concealment, and negligent and fraudulent misrepresentation. Those issues were retained by the trial court and we will not consider them.

We hold the 2006 amendment to the LLCA is retroactive and permits the claims against Colonial to go forward. We remand for action consistent with this opinion and the holdings found in the linked cases of Chadwick and Roosevelt.

Grosse, J

WE CONCUR:

Ellington, J Baker, J

APPENDIX C

RCW 25.15.303
Remedies available after dissolution.

The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution. Such an action or proceeding against the limited liability company may be defended by the limited liability company in its own name.

[2006 c 325 § 1.]

HOUSE BILL REPORT
SB 6531

As Passed House:
February 28, 2006

Title: An act relating to preserving remedies when limited liability companies dissolve.

Brief Description: Preserving remedies when limited liability companies dissolve.

Sponsors: By Senators Weinstein, Fraser and Kline.

Brief History:
Committee Activity:
Judiciary: 2/20/06 [DP].
Floor Activity:
Passed House: 2/28/06, 97-0.

Brief Summary of Bill

- Provides a three year period following dissolution of a limited liability company during which the dissolution of the company does not extinguish any cause of action against the company.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 9 members: Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell, Kirby, Springer and Wood.

Staff: Bill Perry (786-7123).

Background:

A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership.

Attributes of Corporations and LLCs
Corporations are creatures of statutory law and are created only by compliance with prescribed formal procedures. A corporation is managed by directors and officers, but is owned by shareholders who may have very little direct role in management. Generally, ownership shares are transferable, and each shareholder is liable for corporate debts only to the extent of his or her own investment in the corporation. A corporation is treated as a taxable entity.

General partnerships, on the other hand, are business entities recognized as common law that require no formal creation, and are owned and managed by the same individuals who are each liable for the debts of the partnership. A general partnership is not a taxable entity.

The LLCs were authorized by the Legislature in 1994. An LLC is a noncorporate entity that allows the owners to participate actively in management, but at the same time provides them with limited liability. The Internal Revenue Service has ruled that an LLC with attributes that make it more like a partnership than a corporation may be treated as a non-taxable entity.

A properly constructed LLC, then, can be a business entity in which the ownership enjoys the limited liability of a corporation's shareholders, but the entity itself is not taxed as a corporation.

Dissolution of an LLC

An LLCs may be dissolved in a number of ways, including:

- reaching a dissolution date set at the time the LLC was created;
- the occurrence of events specified in the LLC agreement as causing dissolution;
- by mutual consent of all members of the LLC;
- the dissociation of all members through death, removal or other event;
- judicial action to dissolve the LLC; or
- administrative action by the Secretary of State for failure of the LLC to pay fees or to complete required reports.

Certificate of Cancellation

After an LLC is dissolved, or if an LLC has been merged with another entity and the new entity is not the LLC, the certificate of formation that created the LLC is cancelled.

Cancellation may occur in a number of ways:

- The certificate of formation may authorize a member or members to file the certificate of cancellation upon dissolution, or after a period of winding up the business of the LLC.
- A court may order the filing of a certificate of cancellation.
- In the case of a merger that results in a new entity that is not the LLC, the filing of merger documents must include the filing of a certificate of cancellation.
- In the case of an administrative dissolution of an LLC, there is a two year period during which the LLC may be reinstated before the secretary of state files the certificate of cancellation.

After dissolution of an LLC, but before cancellation of the certificate of formation, members of the LLC or a court appointed receiver may wind up the business of the LLC. A person winding up the affairs of an LLC may prosecute or defend legal actions in the name of the LLC.

Preservation of Remedies

The law governing LLCs has no express provision regarding the preservation of remedies or causes of actions following dissolution of the business entity. There is an implicit recognition of the preservation of at least an already filed claim during the wind up period following dissolution, since the person winding up the affairs is authorized to defend suits against the

LLC. However, there is no provision regarding the preservation of claims following cancellation of the certificate of formation.

The current Business Corporation Act provides that dissolution of a corporation does not eliminate any claim against the corporation that was incurred prior to dissolution if an action on the claim is filed within two years after dissolution. There is no "certificate of cancellation" necessary to end a corporation. (*Note: Another currently pending bill, SSB 6596, would increase this two year period to three years, and would make the provision apply to claims incurred before or after dissolution.)*

Summary of Bill:

Dissolution of a limited liability company will not eliminate any cause of action against the company that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of the dissolution.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: A recent court decision has left many homeowners without a remedy for claims against a dissolved corporation. The same problem exists with respect to claims against LLCs. The Bar Association is working on a comprehensive review of the LLC law, but it is not done yet. This bill addresses only the problem of survival of claims following dissolution.

The bill is a step in the right direction. It affirmatively states that claims, such as homeowners' warranty claims, will survive the dissolution of an LLC. Whether or not there are any assets left to satisfy a claim is a separate problem that will have to be addressed later.

Testimony Against: None.

Persons Testifying: Senator Weinstein, prime sponsor; Alfred Donohue, Forsberg Umlauf, P.S.; and Sandi Swarthout and Michelle Ein, Washington Homeowners Coalition.

Persons Signed In To Testify But Not Testifying: None.

SENATE BILL REPORT
SB 6531

As Passed Senate, February 11, 2006

Title: An act relating to preserving remedies when limited liability companies dissolve.

Brief Description: Preserving remedies when limited liability companies dissolve.

Sponsors: Senators Weinstein, Fraser and Kline.

Brief History:
Committee Activity: Judiciary: 1/18/06, 1/31/06 [DP]
Passed Senate: 2/11/06, 41-0.

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.
Signed by Senators Kline, Chair; Weinstein, Vice Chair; Johnson, Ranking Minority Member; Carrell, Esser, Hargrove, McCaslin, Rasmussen and Thibaudeau.

Staff: Cindy Fazio (786-7405)

Background: When a limited liability company (LLC) dissolves, it must pay, or make reasonable provisions to pay, all claims and obligations known to the limited liability company, whether or not the identity of the claimant is known. If there are insufficient assets, the claims and obligations must be paid or provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available.

Summary of Bill: When a LLC dissolves, an action for claims or rights against it must be commenced within three years after the effective date of dissolution in order to survive. This includes claims or rights, or liability incurred, prior to, or after, dissolution.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The Washington State Bar Association could not do a comprehensive review of the limited liability statute for this session, but this one small change should provide important relief in the short term pending that review. This bill is good for homeowners. It removes an incentive for LLCs to act in bad faith. The survival question can only be answered in court without this change. The bill will not add costs to the price of houses. The change is reasonable and will avoid dramatic, unintended consequences.

Testimony Against: None.

Who Testified: PRO: Senator Brian Weinstein, Prime Sponsor; Michelle Ein, Washington Homeowner's Coalition; Ken Harer, Red Oaks Condominiums.